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THE THREE-JUDGE DISTRICT COURT IN CONTEMPORARY FEDERAL JURISDICTION

Congress has provided that in certain cases which are otherwise properly before a federal district court, a special district court composed of three judges, one of whom must be a circuit judge, is required.[1] Theoretically, this requirement is procedural assurance that important litigation will receive commensurate consideration in the federal district courts.[2] One type of litigation which Congress has deemed to merit this special treatment is a suit to enjoin enforcement of a state statute or administrative order on grounds of unconstitutionality.[3] While the three-judge statute is relatively simple in theory, it has proven quite complex in practice and has been a frequent source of controversy.[4] Several recent decisions of the United States Supreme Court have focused attention upon 28 United States Code section 2281,[5] providing inspiration for a number of commentators.[6] Within

[1] See generally ROBERTSON & KIRKMAN, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 201 (2d ed. Wolfson & Kurland 1951). Three judges are required, for example, in: suits to set aside ICC orders, 28 U.S.C. § 2325 (1964); anti-trust and railroad cases certified to be of public importance by the Attorney General, 15 U.S.C. § 28, 49 U.S.C. §§ 44, 45 (1964); condemnation proceedings under the T.V.A. Act, 16 U.S.C. § 83(x) (1964); suits to enjoin enforcement of a federal statute on the ground of its unconstitutionality, 28 U.S.C. § 2282 (1964); and certain cases under the Civil Rights Act of July 2, 1964, §§ 101(d) (voting discrimination), 206(b) (public accommodations), and 707(b) (employment) (1964).

[2] The three-judge statute "was intended to embrace a limited class of cases of special importance and requiring special treatment in the interests of the public..." *Ex parte* Collins, 277 U.S. 565, 567 (1928).

[3] 28 U.S.C. § 2281 (1964) provides:

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title.

For a historical discussion of the statute including the modifications made since its enactment in 1910, see HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 849 (1953).

[4] See Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964); Comment, 49 VA. L. REV. 538, 539 (1963); Note, 47 GEO. L. J. 161 (1958). See also the cases collected in HART & WECHSLER, *op. cit. supra* note 3, at 843-90.

[5] *E.g.*, Swift & Co. v. Wickham, 382 U.S. 111 (1965); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962); Bailey v. Patterson, 369 U.S. 31 (1962); Kesler v. Department of Public Safety, 369 U.S. 153 (1962); Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960).

[6] Of particular inspiration to this writer was the exhaustive undertaking of Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI.

the context of an examination of two recent Supreme Court decisions, *Swift & Co. v. Wickham*[7] and the decision reversed therein, *Kesler v. Department of Public Safety*,[8] this Note will undertake an evaluation of the three-judge requirement today.

I. HISTORICAL SKETCH

The three-judge requirement was a product of the times, originating in an era of economic turbulence, social reform, and political unrest.[9] At the beginning of this century, both state and national governments were attempting to control and regulate various economic activities. Spearheaded by Presidents Roosevelt and Taft, the federal effort was directed at "Big Business" in the form of anti-trust litigation.[10] State regulation took the form of taxation and rate controls, particularly in such expanding industries as railroads and public utilities.[11] Permeating this era were strong feelings of federalism; indeed, the distribution of power between the states and the federal government was of vital concern.[12] This period was also instrumental in the development of the federal court system, particularly as guardian of federal constitutional rights.[13] At the same time, the federal equity power was essentially uncurtailed, being entirely discretionary with the trial judge.[14] Consequently, when the Supreme Court upheld the equity power of a federal judge to enjoin enforcement of an unconstitutional state statute[15] in *Ex parte Young*,[16] it is not surprising that a vigorous

L. REV. 1 (1964). Other outstanding works include: Note, 77 HARV. L. REV. 299 (1963); Comment, 61 MICH. L. REV. 1528 (1963); Comment, 27 U. CHI. L. REV. 555 (1960); Comment, 49 VA. L. REV. 538 (1963); and Comment, 72 YALE L. J. 1646 (1963).

[7] 382 U.S. 111 (1965), 11 VILL. L. REV. 649 (1966).

[8] 369 U.S. 153 (1962), 76 HARV. L. REV. 168 (1962), 15 STAN. L. REV. 565 (1963), 111 U. PA. L. REV. 113 (1962).

[9] Hutcheson, *A Case for Three Judges*, 47 HARV. L. REV. 795, 808 (1934). See generally FRANKFURTER & LANDIS, THE BUSINESS OF THE SUPREME COURT (1927).

[10] FRANKFURTER & LANDIS, THE BUSINESS OF THE SUPREME COURT 104 (1927).

[11] Comment, *The Three-Judge District Court and Appellate Review*, 49 VA. L. REV. 538, 540 (1963).

[12] See Lockwood, Maw & Rosenberry, *The Use of the Federal Injunction in Constitutional Litigation*, 43 HARV. L. REV. 426, 428 (1930). See generally Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L. Q. 499, 519 (1928); Lillienthal, *The Federal Courts and State Regulation of Public Utilities*, 43 HARV. L. REV. 379 (1930).

[13] Hutcheson, *supra* note 9, at 807-10.

[14] *Id.* at 801-02.

[15] A Minnesota statute established reduced rates for railroads and provided remedies and penalties for noncompliance. See HART & WECHSLER, *op. cit. supra* note 3, at 816-20.

[16] 209 U.S. 123 (1908).

controversy ensued.[17] As a compromise,[18] Congress enacted the three-judge statute,[19] borrowing the idea of a court of special dignity from a device which had been successful in certain anti-trust and interstate commerce litigation.[20] Congress was thus able to retain the federal equity power of *Young* to safeguard federal constitutional rights,[21] and, at the same time, protect the states against improvidently issued federal injunctions which could frustrate statutes representing the collective wisdom and policy of a state legislature.[22] Although perhaps directed at a precise evil,[23] the three-judge requirement reflected many considerations.[24] Deference to state pride and dignity was a major, if

[17] See generally 42 CONG. REC. 4847-59 (1908). Typical remarks include the following by Senator Overman of North Carolina, one of the sponsors of the original three-judge act, *id.* at 4847:

> [W]e have come to a sad day when one subordinate Federal judge can enjoin the officer of a sovereign State from proceeding to enforce the laws of the State.... That being so, there... [is] great feeling [against] the fact that one Federal judge has tied the hands of a sovereign State....

Another proponent, Senator Bacon from Georgia, said, *id.* at 4853:

> If these [federal] courts are to exercise the power of stopping the operation of the laws of a State and of punishing the officers of a State, then at least let it be done on notice and not hastily, and let there be the judgment of three judges to decide such questions, and not permit such dangerous power to one man.

[18] Comment, 49 VA. L. REV. 538, 542 (1963).

[19] Act of June 18, 1910, ch. 309, § 17, 36 Stat. 557. The original statute has been amended several times, and is now codified as 28 U.S.C. §§ 2281, 2284 (1964), set out in note 3 *supra*. For a discussion of the changes in the original statute, see HART & WECHSLER, *op. cit. supra* note 3, at 849.

[20] The Expediting Act of 1903, 32 Stat. 823, provided for the convening of three circuit judges in any case under the Anti-Trust Act or the Act to Regulate Commerce certified to be of general importance by the Attorney General. HART & WECHSLER, *op. cit. supra* note 3, at 47-48, 849. See also Hutcheson, *supra* note 9, at 810.

[21] The rationale underlying *Young* was the "not implausible conviction that federal constitutional rights could not be adequately protected without the intervention of federal equity...." Currie, *supra* note 6, at 4. See also HART & WECHSLER, *op cit. supra* note 3, at 814-20.

[22] See Cumberland Tel. v. Louisiana Pub. Serv. Comm'n, 260 U.S. 212 (1922), quoted at note 29 *infra*.

[23] *I.e.*, abuses of the then unrestricted interlocutory injunction power of the federal judge and the concomitant disruption of state taxes and rate control measures. See Comment, *The Three-Judge Federal Court in Constitutional Litigation: A Procedural Anachronism*, 27 U. CHI. L. REV. 555, 563 (1960), where the student contends that these precise evils no longer exist and hence the three-judge court should be abolished. This contention is disputed by many commentators, however. See Currie, *supra* note 6, at 12; Comment, 49 VA. L. REV. 538, 569 (1963); Note, 77 HARV. L. REV. 299, 301-03 (1963). Compare Comment, 72 YALE L.J. 1646, 1649-52 (1963).

[24] See Hutcheson, *supra* note 9, at 810. Indeed, many factors are reflected in the solution provided by Congress. See generally, Currie, *supra* note 6, at 3-12. "The three-judge provisions ... are products of battles between competing political forces over four persistent and significant issues: judicial review, national supremacy, sovereign immunity, and the use of the injunction." *Id.* at 3. See also Comment, 49 VA. L. REV. 538, 542-45 (1963).

As to Congress' objectives, one commentator remarks: "the task of identifying the particular state interest Congress intended to protect is a matter of some difficulty...." Note, 77 HARV. L. REV. 299, 300 (1963).

not dominant, factor in 1910.[25] Implicit was a not unjustified lack of confidence in the integrity and ability of federal judges.[26] Also influential was the omnipresent ingredient of federalism:[27] an injunction issued by three federal judges is less intolerable to a state than one issued by a single federal judge.[28] Moreover, it has been suggested that Congress recognized the delicate interests at stake and therefore sought to ensure greater deliberation in the federal courts by providing a solemn, deliberate judicial proceeding.[29] To expedite the disposition of such important litigation, a prompt procedure[30] and direct appeal to the United States Supreme Court were provided.[31]

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[25] Hutcheson, *supra* note 9, says at 804-05:

> The third mischief [which the three-judge requirement was intended to correct] was the indignity and injustice which it was felt was being done to the states in having their solemn legislative acts, and the efforts of state officers to enforce them, impeded, perhaps frustrated, by the interlocutory fiat of a single judge, issued ... practically without limitation or safeguard except the discretion of the issuing judge. This was the mischief that lay at the root of all the others, dictating the form of the statute, and giving power and reach to the arms of those who contended for its enactment.

But see Note, 77 HARV. L. REV. 299, 300 (1963).

[26] Comment, 49 VA. L. REV. 538, 540 (1963); HART & WECHSLER, *op. cit. supra* note 3, at 47.

[27] See Lockwood, Maw & Rosenberry, *supra* note 12, at 428, 448-50; Comment, 72 YALE L.J. 1646, 1649-50 (1963). In the Senate debate following *Ex parte Young*, Senator Burkett of Nebraska described the contemporary situation as follows, 42 CONG. REC. 4848 (1908):

> [T]here was a very strained condition between Federal and State authority. It apparently would have taken only a match thrown into the box of tinder to have exploded the whole thing.

See also Lawrence v. St. Louis-San Francisco Ry. Co., 274 U.S. 588 (1927), where the Court said:

> But public interest demands that, whenever possible, conflict between the two authorities [state and federal governments] and irritation be avoided. To this end it is important that the federal power be not asserted unnecessarily, hastily, or harshly. It is important also that demands of comity and courtesy, as well as of the law be deferred to ....

[28] In the Senate debates, Senator Overman said, 42 CONG. REC. 4847 (1908):

> [I]f this substitute is adopted and three judges have to pass upon the question of the constitutionality of a State statute and three great judges say the statute is unconstitutional, the officers of the State will be less inclined to resist the orders and decrees of our Federal courts....

See also the remarks of Senator Bacon, note 17 *supra*.

[29] Cumberland Tel. v. Louisiana Pub. Serv. Comm'n, 260 U.S. 212, 216 (1922):

> The wording of the statute leaves no doubt that Congress was by provisions *ex industria* seeking to make interference by interlocutory injunction from a federal court with the enforcement of a state legislation, regularly enacted and in course of execution, a matter of the adequate hearing and the full deliberation which the presence of three judges ... was likely to secure. It was to prevent the improvident granting of such injunctions by a single judge, and the possible unnecessary conflict between federal and state authority always to be deprecated.

Accord, Currie, *supra* note 6, at 7; Note, 77 HARV. L. REV. 299, 303 (1963); Note, 15 STAN. L. REV. 565, 567 (1963).

[30] 28 U.S.C. § 2284(4) (1964) now provides: "In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day...."

[31] 28 U.S.C. § 1253 (1964) now provides:

> Except as otherwise provided by law, any party may appeal to the Supreme

II. The Three-Judge Statute in the Courts

In addition to determining whether the requisite elements of federal jurisdiction are presented,[32] the federal district judge must examine a complaint to determine whether three judges are required pursuant to section 2281.[33] If he determines that three judges are required, he immediately notifies the chief justice of the circuit who then orders the prompt convening of the three-judge court.[34] Unfortunately, this determination is frequently not an easy task;[35] many problems of interpretation have arisen throughout the three-judge statute's somewhat turbid history: What is a "state statute"?[36] Who is a state "officer"?[37] What is the meaning of "unconstitutional"?[38] Consequently, the three-judge requirement presents considerable practical

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Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

See also *Ex parte* Collins, 277 U.S. 565, 569 (1928).

[32] See Note, 77 Harv. L. Rev. 299, 306-10 (1963); Comment, 49 Va. L. Rev. 538, 546-47 (1963).

[33] *Ex parte* Collins, 277 U.S. 565 (1928). 28 U.S.C. § 2284 (1964) specifies the procedure for convening a three-judge court. See Fiumura v. Texaco, Inc., 240 F. Supp. 325, 326 (E.D. Pa. 1965), where the court said: "[T]he district judge to whom the application is made must as an independent judicial function determine whether... the case is one required to be determined by a three-judge statutory court."

[34] Fiumura v. Texaco, Inc., 240 F. Supp. 325, 326 (E.D. Pa. 1965) (Biggs, Chief Judge):

> The chief judge of the circuit shall... exercise as an independent function his judgment as to whether or not the case is one which requires determination by a three-judge statutory court. In short, the concurrence of the separate and independent judicial acts of the district judge and the chief judge of the circuit is required for the constituting of a three-judge statutory court.

[35] Currie, *supra* note 6, at 13. See Comment, 49 Va. L. Rev. 538, 547-55 (1963).

[36] For an excellent discussion of the problems of interpreting "state statutes," see Currie, *supra* note 6, at 29-49. See also Comment, 49 Va. L. Rev. 538, 548-50 (1963); Note, *Three-Judge Court—"Meaning of State Statute"* 30 N.C.L. Rev. 423 (1952).

[37] Although the other requisites of the three-judge statute are present, three judges are not required where the defendants are local officers rather than state officers. *Ex parte* Collins, 277 U.S. 565, 568 (1928). For a general discussion of the construction problems, see Comment, 49 Va. L. Rev. 538, 550-51 (1963).

[38] The claim of "unconstitutionality" must not be frivolous. *Ex parte* Poresky, 290 U.S. 30 (1933).

The United States Supreme Court has construed "unconstitutional" in several recent decisions. In Bailey v. Patterson, 369 U.S. 31 (1962), 50 Calif. L. Rev. 728, plaintiff Negroes sought to enjoin enforcement of Mississippi statutes which required racial segregation in transportation facilities. Although several Supreme Court decisions had clearly established that a state can not require racial segregation of transportation facilities, the three-judge court abstained pending possible construction of these laws by the Mississippi courts. Upon direct appeal, the Court held that three judges are not required under § 2281 when "prior decisions make frivolous any claim that a state statute on its face is not unconstitutional." 369 U.S. at 33. Two other decisions, Swift & Co. v. Wickham, 382 U.S. 111 (1965), and Kesler v. Department of Public Safety, 369 U.S. 153 (1962), are examined *infra*.

difficulty for the district judge charged with making the threshold determination of whether three judges are required.[39]

The three-judge requirement has proven to be equally troublesome for litigants and for the courts. Unfortunately, the Supreme Court has done little to ameliorate this situation;[40] to the contrary, several recent decisions seem to have exacerbated it.[41] Also productive of difficulty is the complicated nature of the three-judge appellate provisions.[42]

Repeatedly emphasizing the demands which the three-judge requirement supposedly makes upon the federal judiciary, the Supreme Court has avowedly adopted a policy of strict construction of section 2281.[43] Frequently recited is the burden imposed upon the lower courts: convening three judges is cumbersome and disrupts the normal operation of the federal courts, especially in non-metropolitan areas.[44] Also noted, and of perhaps more significance, is the burden imposed upon the Court itself by virtue of mandatory direct review of three-

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[39] See Currie, *supra* note 6, at 23.

[40] Chief Justice Warren seemed to recognize this when he said in Kesler v. Department of Public Safety, 369 U.S. 153, 175 (1962) (dissenting opinion):

> When to convene a three-judge court has always been a troublesome problem of federal jurisdiction and a review of the cases involving that question illustrates the difficulty the lower courts have had in applying the principles formulated by this court....

[41] *E.g.*, Bailey v. Patterson, 369 U.S. 31 (1962), discussed in note 38 *supra*, holding that three judges are not required when the state statute is clearly unconstitutional. This thrusts upon the district judge the difficult task of determining when prior decisions have clearly established that the challenged statute is unconstitutional. Note, 77 HARV. L. REV. 299, 315-16 (1963); Comment, 61 MICH. L. REV. 1528, 1533-34 (1963). *Bailey v. Patterson* was followed in Turner v. City of Memphis, 369 U.S. 350 (1962). See also Kesler v. Department of Public Safety, 369 U.S. 153 (1962), discussed *infra*.

[42] An examination of the problems of appellate review in three-judge litigation is beyond the scope of this undertaking. For an excellent discussion, see Comment, *The Three-Judge District Court and Appellate Review*, 49 VA. L. REV 538, 555-69 (1963).

[43] Phillips v. United States, 312 U.S. 246, 251 (1941). The *Phillips* opinion, generally cited as authority for this proposition, was written by Justice Frankfurter who has spearheaded the Court's restrictive view of the three-judge requirement. See Kesler v. Department of Public Safety, 369 U.S. 153, 156-57 (1962); Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 92-93 (1960) (dissenting opinion); see also FRANKFURTER & LANDIS, THE BUSINESS OF THE SUPREME COURT 255-94 (1928).

[44] *E.g.*, "[t]he requirement of three judges, of whom one must be a...circuit judge, entails a serious drain upon the federal judicial system particularly in regions where, despite modern facilities, distance still plays an important part in the effective administration of justice. And all but the few great metropolitan areas are such regions. . . ." Justice Frankfurter in Phillips v. United States, 312 U.S. 246, 251 (1941). See also Kesler v. Department of Pubic Safety, 369 U.S. 153, 156 (1962); Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 92 (1960) (dissenting opinion). *But see* Hutcheson, *A Case for Three Judges*, 47 HARV. L. REV. 795, 826 (1934), quoted *infra* note 91.

judge determinations.[45] In short, the Court, motivated by a perhaps misguided concern for judicial efficiency, has consistently curtailed the scope of section 2281 despite its seemingly strong underlying policy considerations.[46]

III. "UNCONSTITUTIONALITY" UNDER SECTION 2281: THE SUPREMACY CLAUSE

The Court's restrictive attitude was again manifested in two recent decisions construing the "unconstitutionality" requirement of section 2281.[47] Although this requirement has been in existence for over fifty years, the Supreme Court had never considered the precise question whether a claim that a state statute was in conflict with a federal statute—a violation of the supremacy clause of the Constitution—was a ground of "unconstitutionality" within the meaning of section 2281.[48] An early three-judge court had answered this question affirmatively,[49] but subsequent Supreme Court decisions seemed to the contrary.[50] In fact, as a result of these decisions, many authorities thought that three judges were not required in supremacy clause cases.[51] Nonetheless, in 1960, a Utah federal district judge had three judges convened under section 2281 upon receipt of a complaint in which the only ground of unconstitutionality alleged was a potential violation of the supremacy clause.[52] The three-judge court upheld the validity of the Utah statute and plaintiff appealed on the merits directly to the United States Supreme Court.[53]

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[45] *E.g.*, Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 92-93 (1960) (dissenting opinion); Phillips v. United States, 312 U.S. 246, 251 (1941). See also note 92 and text accompanying notes 92-93 *infra*.

[46] See HART & WECHSLER, *op. cit. supra* note 3, at 849.

[47] See note 38 *supra*.

[48] See Kesler v. Department of Public Safety, 369 U.S. 153, 157-58 (1963), quoted in part in note 54 *infra*.

[49] Michigan Central R.R. v. Michigan Pub. Util. Comm'n, 271 Fed. 319 (E.D. Mich. 1921).

[50] Case v. Bowles, 327 U.S. 92 (1946); *Ex parte* Bransford, 310 U.S. 354 (1940); *Ex parte* Buder, 271 U.S. 461 (1926). Compare the Court's "reinterpretation" of these decisions in Swift & Co. v. Wickham, 382 U.S. 111, 122 (1965).

[51] Note, 111 U. PA. L. REV. 113, 115-16 (1962); Note, 15 STAN. L. REV. 565, 568-69 (1963). Indeed, in 1960 one authority stated: "A three judge court is not required under 28 U.S.C. § 2281, where the objection to a state statute and its application is that it is in conflict with a federal statute and that thereby the supremacy clause of the Federal Constitution is violated." Annot., 4 L.Ed. 2d 1931, 1962 (1960). See also Bell v. Waterfront Comm'n, 279 F.2d 853, 858-59 (2d Cir. 1960).

[52] *In re* Kesler, 187 F. Supp. 277 (D. Utah 1960). It is interesting to note that the district judge receiving the complaint requested three judges, perceiving no issue as to whether supremacy clause cases were within § 2281. Compare Bell v. Waterfront Comm'n, 183 F. Supp. 175 (S.D.N.Y. 1960).

[53] Kesler v. Department of Public Safety, 369 U.S. 153 (1962).

IV. *Kesler v. Department of Public Safety*

Before considering the merits, the Court noted a "preliminary point of jurisdiction ... though it was not adverted to either by the District Court or by the parties. Was this a proper case for convening a three-judge court...?"[54] The Court, in an opinion by Justice Frankfurter, found that three judges were properly convened. Justice Frankfurter pointed out that section 2281 draws no distinction among various constitutional provisions,[55] but, rather than overrule the line of authority generally considered to make such a distinction, he chose to distinguish these cases as presenting issues of statutory construction.[56] Thus, *Kesler* established the following test for supremacy clause cases under section 2281:[57]

> If in immediate controversy is not the unconstitutionality of a state law but merely the construction of a state law or the federal law, the three-judge requirement does not become operative.

Because the unconstitutionality of the Utah law was in "immediate controversy," three judges were properly convened.

Because the three-judge court was properly convened, the Court had jurisdiction to review the merits on direct appeal. To resolve the substantive issue[58] Justice Frankfurter undertook an extensive

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[54] 369 U.S. at 155. If three judges were not required, the Supreme Court is without jurisdiction to entertain the direct appeal on the merits; appeal in such instances lies to the circuit court of appeals. ROBERTSON & KIRKMAN, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES § 203 (2d ed. 1951). Note, *The Three-Judge District Court and Appellate Review*, 49 VA. L. REV. 538, 567-68 (1963).

[55] Justice Frankfurter states, 369 U.S. at 156:

> [Appeal should be allowed] unless invalidation of a state statute by virtue of the Supremacy Clause rests on a different constitutional basis than such invalidation because of conflict with any other clause of the Constitution, at least to the extent of reading such an implied exception into the procedure devised by § 2281. Neither the language of § 2281 nor the purpose which gave rise to it affords the remotest reason for carving out an unfrivolous claim of unconstitutionality because of the Supremacy Clause from the comprehensive language of § 2281.

[56] 369 U.S. at 157-58. "This case presents a sole, immediate constitutional question, differing from *Buder, Bransford,* and *Case,* which presented issues of statutory construction even though perhaps eventually leading to a constitutional question." *Id.* at 158.

[57] *Id.* at 157.

[58] The substantive issue concerned an alleged conflict between Utah's Motor Vehicle Safety Responsibility Act, UTAH CODE ANN. § 41-12-14(a) (1960) and § 17 of the Bankruptcy Act, 52 Stat. 851 (1938), 11 U.S.C. § 35 (1964). The Utah statute provided for suspension of the driving privileges of debtors having unsatisfied judgments against them. On the other hand, § 17 of the Bankruptcy Act provides that a discharge in bankruptcy relieves the debtor from all provable debts. In Reitz v. Mealey, 314 U.S. 33 (1941), the Supreme Court upheld a New York statute which provided for *automatic* suspension of driving privileges upon However, the Utah statute did not provide automatic suspension; rather, it permitted failure to satisfy a judgment as a valid exercise of the state's "police power." the creditor to determine whether the driver's privileges should be suspended.

discussion of the statutes in controversy.[59] Many viewed this review as "statutory construction," thereby giving rise to considerable confusion as to just what the *Kesler* "immediate controversy" test entailed.[60] One thing was clear: the *Kesler* ruling further complicated the district judge's already difficult task of determining when three judges are required.[61] After *Kesler,* the district judge must determine, first, what "statutory construction" is, and second, when the meanings of the statutes are sufficiently clear so that no statutory construction will be necessary before the constitutional issue is reached. The commentators forecast considerable difficulty in the application of such a technical rule.[62]

This criticism proved to be well-founded. In 1964, two large turkey processing companies, Swift and Armour, found themselves unable to comply with inconsistent federal and New York State package labeling requirements.[63] After the federal agency denied their request to mod-

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As pointed out by the Court, 369 U.S. at 165, twenty-one states had similar financial responsibility provisions. Consequently, this question, which was not answered in Reitz v. Mealy, *supra,* was now of considerable importance. This aspect of the *Kesler* case is discussed in Note, *The Supreme Court, 1961 Term,* 76 HARV. L. REV. 54, 150-52 (1962); Note, 111 U. PA. L. REV. 113, 119-22 (1962).

[59] 369 U.S. at 158-74.

[60] In the dissent, Chief Justice Warren maintained that statutory construction was always necessary in supremacy clause cases, 369 U.S. at 177-78 & n.13, and contended that "the Court's opinion refutes the very test which it establishes...." 369 U.S. at 177. It is equally plausible that the extensive statutory discussion need not be viewed as "construction"; indeed, the meaning and application of the relative statutes was clear: the issue confronting the Court was whether the conflict between the provisions justified invalidation of the state statute under the supremacy clause. See Note, 76 HARV. L. REV. 168, 169 (1962); Note, 111 U. PA. L. REV. 113, 116-17 (1962). Another reading of *Kesler* is that the "immediate controversy" test applies only to the three-judge court. Thus, whether the Supreme Court engages in "statutory construction" is immaterial with respect to whether a three-judge court may do so. As one writer points out, the jurisdictional question must be distinguished from the substantive question. Comment, 61 MICH. L. REV. 1528, 1536 (1962). Moreover, it is possible that the Court coincidentally took the opportunity in *Kesler* to resolve the important substantive issue of the apparent conflict between state financial responsibility laws and the federal Bankruptcy Act. See note 58 *supra.*

[61] See text accompanying notes 33-39 *supra.*

[62] In a footnote in Swift & Co. v. Wickham, 382 U.S. 111, at n.20 (1965), the Court cited the following authorities as critical of *Kesler:* Note, 77 HARV. L. REV. 299, 313-15 (1963); 76 HARV. L. REV. 168 (1962); 15 STAN. L. REV. 565 (1963); Currie, *The Three-Judge District Court in Constitutional Litigation,* 32 U. CHI. L. REV. 1, 61-64 (1964); 111 U. PA. L. REV. 113 (1962); 1962 U. ILL. L.F. 467; and Note, 49 VA. L. REV. 538, 553-555 (1963).

[63] Under regulations and rulings implementing N.Y. AGRIC. & MARKETS LAW § 193 (McKinney 1954), turkey packages must contain labels setting forth the weight of the unstuffed bird as well as the gross weight of the package. But regulations issued by the Secretary of Agriculture implementing the Poultry Products Inspection Act of 1957, 71 Stat. 441, 21 U.S.C. §§ 451-69 (1964), required the package to state merely the net weight of the turkey (including stuffing). The U.S. Department of Agriculture refused to permit use of labels which would satisfy both requirements.

ify their label so as presumably to comply with both requirements, the companies commenced suit in a federal district court to enjoin enforcement of the state statute as preempted by the federal enactment under the supremacy clause.[64] Upon receipt of the complaint, the district judge had a three-judge court convened. Although expressing doubt as to whether they were properly convened under *Kesler,* the three-judge court reserved this question until after they had considered the merits.[65] Upon resolving the substantive issue by dismissing the complaint, the court considered whether three judges should have been convened under *Kesler,* stating:[66]

> When we reflect on what we have written, we think we have indeed construed the [federal] Poultry Products Inspection Act.... The *Kesler* case itself required consideration of the purpose and effect of [the federal statute] ....The question therefore is not whether we have engaged in construction of a federal statute *simpliciter,* but whether we have engaged in so much more construction than in *Kesler* as to make that ruling inapplicable.

After stating this question, the three-judge court avoided answering it,[67] instead, cautiously acting in a dual capacity as both a single-judge and three-judge court, the court rendered its decree dismissing the complaint.[68]

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[64] Swift & Co. v. Wickham, 230 F. Supp. 398 (S.D.N.Y. 1964). In addition to the supremacy clause contention, plaintiffs also maintained that the New York statute violated the commerce clause and the fourteenth amendment due process and equal protection clauses. These latter contentions, however, were dismissed as insubstantial. Consequently, only the supremacy clause allegation was in issue.

[65] "For reasons that will later appear, we think it best to take what might seem the unorthodox course of discussing the merits before we address ourselves to the puzzling question, which the parties have not disputed, whether the case is appropriate for a three-judge court under § 2281." 230 F. Supp. at 401. The court then devoted nine pages to the substantive issue, concluding that the complaint should be dismissed because of plaintiff's failure to seek available administrative review. Query, if the complaint was dismissed because of plaintiff's failure to exhaust administrative remedies (*i.e.,* administrative review of the refusal of their request for labels which would satisfy both state and federal requirements), why did the three-judge court indulge in statutory construction, thereby raising the *Kesler* problem? Indeed, the three-judge court should not have been convened in the first place for, if plaintiffs had administrative review available, it would seem that federal equity jurisdiction would simply not be available. *Cf.* Natural Gas Pipeline Co. v. Slattery, 302 U.S. 300 (1937).

[66] 230 F. Supp. at 409-10. The three-judge court also characterized the *Kesler* majority's determination of the substantive issue as "statutory construction."

[67] Said the court: "If we were obliged to answer that question, we would say we had. But we see no need to assume a task for which our litmus paper is not sufficiently sensitive to permit an assured answer, and as to which the consequences of a wrong decision might be so serious...." 230 F. Supp. at 410.

[68] This was noted by the Supreme Court, on review. Swift & Co. v. Wickham, 382 U.S. 111, 114 n.4 (1965):

> The three-judge court dismissed the complaint "certifying out of abundant

V. *Swift & Co. v. Wickham*

Upon direct appeal, the Court immediately directed its attention to whether three judges were properly convened below.[69] The Court was obviously influenced by the lower court's difficulty in applying the *Kesler* test; so, rather than merely apply the *Kesler* test to the facts and hold that three judges were not required, the Court resolved to reconsider *Kesler,* stating:[70]

> We think, however, that such a disposition of this important jurisdictional question would be less than satisfactory, that candor compels us to say that we find application of the *Kesler* rule as elusive as did the District Court, and that we would fall short in our responsibilities if we did not accept this opportunity to take a fresh look at the problem. . . . Unless inexorably commanded by statute, a procedural principle of this importance should not be kept on the books in the name of *stare decisis* once it is proved to be unworkable in practice; the mischievous consequences to litigants and courts alike from the perpetuation of an unworkable rule are too great. . . .

Concluding that the *Kesler* test was in fact unworkable, the Court overruled it *pro tanto.* In light of the confusion which accompanied *Kesler,* the Court is to be commended for its willingness to review such a recent decision.[71]

Overruling *Kesler* was one thing; still confronting the Court was the question of how to treat supremacy clause cases under section 2281. At one point the Court stated that pre-*Kesler* case law had clearly established that supremacy clause cases were not within the purview of the three-judge statute.[72] Nonetheless, the Court purported

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caution" that the original district judge, also a member of the three-judge panel, "individually arrived at the same conclusion." 230 F. Supp. at 410. This procedure for minimizing prejudice to litigants when the jurisdiction of a three-judge court is unclear has been used before, see Query v. United States, 316 U.S. 486 [1942]. . . .

[69] Swift & Co. v. Wickham, 382 U.S. 111 (1965).

[70] 382 U.S. at 115-16.

[71] This is not to commend the Court for overruling *Kesler,* however. Indeed, Justice Douglas contended that the Court's conclusion that the *Kesler* test was unsatisfactory was based upon "virtually no experience," but rather upon "the gloomy predictions contained in a handful of Law Review articles." 382 U.S. at 133-35 (dissenting opinion). Instead, the Court might have taken the opportunity to clarify the *Kesler* test.

[72] After reviewing *Buder, Bransford,* and *Case,* which were distinguished in *Kesler,* the Court stated: "The upshot of these decisions is abundantly clear: Supremacy Clause cases are not within the purview of § 2281." 382 U.S. at 122. How these same three cases can now be cited to support this statement after they were distinguished in *Kesler* only three years earlier is somewhat puzzling. Consider Justice Roberts' remarks in Smith v. Allwright, 321 U.S. 649, 669-70 (1944) (dissenting opinion):

> The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal

to treat the question as open, and set out to determine whether three judges should be required in supremacy clause cases. The Court reviewed several considerations supporting an affirmative answer,[73] but concluded:[74]

> Persuasive as these considerations may be, we believe that the reasons supporting the ... interpretation [that supremacy clause cases are not within the purview of section 2281] ... should carry the day. This restrictive view ... is more consistent with a discriminating reading of the statute itself than is the ... more embracing interpretation [found in *Kesler*] ....

One familiar with the Court's attitude toward the three-judge statute is not surprised at this conclusion.[75] Nonetheless, the Court's treatment of this specific question is disappointing. The Court did not consider the strong arguments supporting the inclusion of supremacy clause cases within section 2281.[76] Similarly the explication of the reasons supporting its restrictive decision was not convincing—the Court relied upon some rather specious statutory construction,[77] an examination of the three-judge statute's historical purpose,[78] and the

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into the same class as a restricted railroad ticket, good for this day and train only ....

It is regrettable that in an era marked by doubt and confusion, an era whose greatest need is steadfastness of thought and purpose, this court, which has been looked to as exhibiting consistency in adjudication, and a steadiness which would hold the balance even in the face of temporary ebbs and flows of opinion, should now itself become the breeder of fresh doubt and confusion in the public mind as to the stability of our institutions.

[73] The Court noted: (1) that, as a practical matter, there is no need to distinguish among various constitutional grounds; (2) that § 2281 speaks only of "unconstitutionality," which certainly could embrace a violation of the supremacy clause; (3) that "there is some policy justification for a wider rule"; and (4) that the affront to state sensitivities is the same whether the ground of unconstitutionality is based upon the supremacy clause or some other provision of the Constitution. 382 U.S. at 125-26.

[74] 382 U.S. at 126.

[75] See text accompanying notes 38-42 *supra*.

[76] The Court completely ignored any possible contemporary utility which the three-judge court may serve. See Note, *The Three-Judge Court Reassessed: Changing Roles in Federal-State Relationships*, 72 YALE L.J. 1646 (1963), and text accompanying notes 87-90 *infra*. Moreover, although the Court had discussed several underlying policy justifications for the three-judge court, 382 U.S. at 116-19, it only considered one—the affront to state dignity—when it purported to weigh the competing considerations upon which the question in issue turned.

[77] 382 U.S. at 126-27. The Court itself was not convinced by its construction: "We do not suggest that this reading of § 2281 is compelled. We do say, however, that is an entirely appropriate reading, and one that is supported by all the precedents in this Court until *Kesler* and by sound policy considerations." *Id.* at 127. The Court did not reveal these "sound policy considerations," although it did speak of judicial administration as a "buttressing" consideration. As to this consideration, see text accompanying notes 95-98 *infra*.

[78] 382 U.S. at 127-28. The Court discerned that Congress was concerned with problems which are not presented in supremacy clause cases, although the Court candidly admitted that "an examination of the origins of the three-judge procedure

Court's traditional concern for judicial adminstration.[79] In short, rather than treat the supremacy clause issue anew, the Court continued to approach three-judge cases in its traditional restrictive manner. It is submitted that the Court's failure to make a realistic appraisal of the contemporary utility of the three-judge requirement, coupled with the Court's continued reliance upon an admittedly dubious concern for judicial administration,[80] detracts from an otherwise commendable decision.

VI. The Three-Judge Court Today

Conditions have markedly changed since the enactment of the original three-judge statute in 1910; some of the considerations which gave rise to the requirement have disappeared;[81] others have diminished in significance;[82] but many remain with continued vitality.[83] At the same time, there may be new functions that the three-judge

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does not suggest what the legislators would have thought about this particular problem...." *Id.* at 127. Presumably, said the Court, a supremacy clause case "involved more confining legal analysis and can hardly be thought to raise the worrisome possibilities that economic or political predilections will find their way into a judgment...." *Ibid.* Compare Justice Black's remarks about supremacy clause cases in an earlier three-judge case, Hines v. Davidowitz, 312 U.S. 52, 67 (1941):

> There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. . . .

[79] "[T]his Court's concern for efficient operation of the lower federal courts persuades us to return to the *Buder-Bransford-Case* rule, thereby conforming with the constrictive view of the three-judge jurisdiction which this Court has *traditionally* taken...." 382 U.S. at 129. [Emphasis added.]

[80] After quoting Justice Frankfurter's dissenting opinion in Florida Lime & Avocado Growers v. Jacobsen, 362 U.S. 73, 92-93 (1962), which flatly states that there is a "burden," the Court admits that "the number of three-judge determinations each year should not be exaggerated" and cites recent statistics which seem to suggest that the burden upon the lower federal courts is in fact infinitesimal. 382 U.S. at 128.

[81] The relatively uncurtailed equity power of federal judges, see text accompanying notes 14 & 26 *supra*, has now been severely restricted by Rule 65 of the Federal Rules of Civil Procedure. Moreover, by virtue of the Johnson Act of 1934, 28 U.S.C. § 1342 (1964), and the Tax Injunction Act of 1937, 28 U.S.C. § 1341 (1964), federal courts no longer have power to enjoin the enforcement of state public utility rate controls or state tax measures. See Note, 15 Stan L. Rev. 565, 572-73 (1963). See also Comment, 27 U. Chi. L. Rev. 555 (1960), in which the writer contends that the three-judge court should be abolished as no longer necessary.

[82] See text accompanying notes 88-89 *infra*.

[83] See text accompanying notes 90-92 *infra*.

court may fulfill which, although not contemplated by its originators, should nonetheless be considered in any evaluation of section 2281.[84] Consequently, it is submitted that any examination of the three-judge requirement should focus upon the *present* need for this special tribunal and weigh this against its alleged disadvantages.

Perhaps the quality and integrity of the federal judge no longer presents a compelling consideration;[85] at the same time, it should be remembered that judges are human.[86] Although perhaps not as significant as in 1910, federalism remains important in such sensitive areas of federal-state relations as civil rights and reapportionment.[87] Moreover, in these cases the matter in controversy is a state statute and of considerable importance to the state. Furthermore, questions of constitutionality are frequently difficult and, hence, better resolved by a more authoritative, deliberate tribunal. Consequently, it is submitted that a need does exist for a special tribunal to consider suits involving constitutional challenges to state statutes.

Against this need, one must compare the disadvantages of the

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[84] *E.g.*, in Comment, *The Three-Judge Court Reassessed: Changing Roles in Federal-State Relationships*, 72 YALE L. J. 1646, 1649-52 (1963), it is noted that the three-judge court is apt to be more sensitive to the needs and objectives of national programs. Cognizant of the increasing role of the national government, the student suggests that the special court can fulfill a new role in federal litigation by implementing the national policy. Such a function, however, seems inconsistent with the three-judge court's primary role of maintaining the delicate balance of federal-state relations.

[85] As pointed out in note 81 *supra*, the equity power of the federal judge is now substantially curtailed. Moreover, as one author has stated: "It seems fair to assume that men selected for the bench are capable and impartial enough to do their job without assistance ...." Currie, *supra* note 62, at 2. See also Note, 72 YALE L. J. 1646, 1651 (1963). Compare BORKIN, THE CORRUPT JUDGES (1962). See generally MATHEWS, PROBLEMS ILLUSTRATIVE OF THE RESPONSIBILITIES OF MEMBERS OF THE LEGAL PROFESSION 112-17 (rev. ed. 1966).

[86] See Jones, *The Trial Judge—Role Analysis and Profile*, THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION 124-45 (1965); Note, *Remedies For Judicial Misconduct and Disability: Removal and Discipline of Judges*, 41 N.Y.U.L. REV. 149 (1966).

[87] *Accord*, Note, 77 HARV. L. REV. 299, 303 (1963); Comment, 72 YALE L.J. 1646, 1660 (1963). By requiring three judges in certain cases under the 1964 Civil Rights Act, Congress has demonstrated the present utility of the special tribunal. *But see* Comment, 27 U. CHI. L. REV. 555, 559 (1960), and compare Comment, 72 YALE L. J. 1646, 1651-52 (1963):

> Since state and federal governmental responsibilities have shown a marked tendency to overlap, a situation [has been created] where conflict between national and local regulation is unavoidable.... Consequently, the need for recognition of the superior claims of the [national interests] requires the reconciliation of state programs to national aims. Thus, there is a current tendency to view federalism as a process to be comprehended not in terms of relations between the formal institutions of competing or cooperating governments, but in terms of increasing responsiveness to the national interest on the part of local decision makers.

The writer cited no authority for his "current tendency." Such a function would exacerbate rather than ameliorate federal-state relations.

three-judge requirement. Although convening three judges is cumbersome and disrupts the ordinary operation of the federal court system,[88] the extent of this "disadvantage" must be kept in perspective. In 1965, less than 0.5 per cent of all trials in the federal district courts were section 2281 three-judge cases.[89] Thus, in terms of statistics, the three-judge requirement does not seem to constitute a significant burden upon the lower federal courts.[90] Indeed, the federal judiciary itself seems to support this conclusion.[91] On the other hand, the disadvantage arising from the burden imposed upon the Supreme Court by the obligatory direct review of three-judge determinations presents a more serious problem.[92] It is all too well-known that the Court is unable to hear more than a small percentage of the cases reaching it.[93] As the class of cases in which Congress has provided mandatory review increases, the number of cases which the Court may voluntarily review necessarily decreases. Because of its ability to grant certiorari on a case-by-case basis (as contrasted with the Congressional determination which is statutory and consequently inflex-

[88] See note 44 *supra*.

[89] DIR. ADMIN. OFF. U.S. COURTS ANN. REPORT 116, 118 (1965). In 1965, out of 11,485 trials completed by the federal district courts, only 52 involved potential § 2281 cases. Statistics for previous years are comparable and are summarized in Comment, 72 YALE L.J. 1646, 1658-59 (1963).

[90] *Accord*, Swift & Co. v. Wickham, 382 U.S. 111, 128 (1965) (*semble*). See also Currie, *supra* note 62, at 12; Note, 77 HARV. L. REV. 299, 305 (1963); Comment, 72 YALE L. J. 1646, 1658 (1963).

[91] Although made in 1934, the following statement by a fifth circuit judge based upon a survey of all district court judges in the fifth circuit may well remain valid today:

> [The replies to the questionnaires] . . . showed the efficiency and flexibility of the three-judge device in disposing, on interlocutory hearings, of the business for which it was constituted. . . . It is quite evident from these reports that while these cases do constitute an important item in the business of the district courts, *they do not create an undue burden here.*

Hutcheson, *A Case for Three Judges*, 47 HARV. L. REV. 795, 826 (Appendix) (1934) (emphasis added).

It appears that Judge Hutcheson's remarks continue reliable today because the federal judiciary has not since spoken to the contrary. See Comment, 72 YALE L. J. 1646, 1658 (1963). This silence is significant in light of the annual Judicial Conference of Senior Circuit Justices where considerable attention is focused upon the administration of the federal court system. See Chandler, *The Administration of the Federal Courts*, 13 LAW & CONTEMP. PROB. 182, 185, 195-97 (1948). See also Shafroth, *Federal Judicial Statistics*, 13 LAW & CONTEMP. PROB. 200 (1948).

[92] An aspect of this "burden" is suggested by Justice Frankfurter:

> [D]irect review of District Court judgments by this Court not only expands this Court's obligatory jurisdiction but contradicts the dominant principle of having this Court review decisions only after they have gone through two judicial sieves....

Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73, 92-93 (1960) (dissenting opinion). See generally FRANKFURTER & LANDIS, THE BUSINESS OF THE SUPREME COURT 255-94 (1927), and Taft, *The Jurisdiction of the Supreme Court Under the Act of February 13, 1925*, 35 YALE L.J. 1, 2-3 (1925).

[93] See FREUND, THE SUPREME COURT OF THE UNITED STATES 15-16 (1961); Hart, *Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959).

ible), the Court can presumably best select which cases are appropriate for review on the basis of each case's importance.[94] On the other hand, when the Court is required by Congress to hear a case which is, in fact, of minimal importance, the Court must forego reviewing a more important case. Consequently, to the extent that direct review under section 1253 has this effect, a significant burden is imposed upon the Supreme Court.

It does not follow, however, that the three-judge statute should be strictly construed as the Supreme Court has concluded,[95] or, as one writer suggests, abolished completely.[96] Rather than throw the baby out with the bath, it is submitted that the solution should be directed at the problem—the obligatory direct review of three-judge determinations. Indeed, two commentators recently have examined the three-judge provisions and have proposed Congressional changes in the direct review requirement. One commentator would abolish the direct appeal.[97] The other would restrict direct appeal to cases where the state statute is declared unconstitutional; in other instances, appeal would be to the circuit courts of appeal with discretionary certiorari thereafter.[98] Each of these proposals has merit and either would relieve the direct review burden presently underlying most criticism of the three-judge requirement.

VII. OTHER PROBLEMS

In addition to the burdensome obligatory direct review provisions, other aspects of the three-judge provisions merit Congressional reexamination. Three judges are required only when injunctive relief is sought.[99] Yet the underlying policy considerations seem to apply to any form of equitable relief.[100] Thus, the scope of section 2281 should be enlarged to encompass all constitutional challenges to state statutes irrespective of the relief sought. From the outset, the three-

[94] Currie, *supra* note 62, at 74.
[95] Phillips v. United States, 312 U.S. 246 (1941). See text accompanying notes 43-46 *supra*.
[96] Comment, *The Three-Judge Federal Court in Constitutional Litigation: A Procedural Anachronism*, 27 U. CHI. L. REV. 555 (1960).
[97] Comment, 72 YALE L. J. 1646, 1657 (1963).
[98] Currie, *supra* note 62, at 76.
[99] See note 3 *supra*.
[100] For example, three judges are not required when a declaratory judgment is sought. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963). Nonetheless, the result is the same, as a practical matter, when a statute is declared unconstitutional irrespective of the relief granted. For an extended discussion, see Currie, *supra* note 62, at 13-20.

judge statute was intended to protect the states, the real defendants in an action challenging a state statute as unconstitutional.[101] Nonetheless, the plaintiff determines whether three judges are necessary because the courts look to his complaint to ascertain whether the requisite elements of section 2281 are present.[102] By skillful pleading, the plaintiff can obtain or avoid three judges, as he deems expedient.[103] Since the three-judge statute provides procedural protection for the states, its applicability accordingly should be determined by the states.[104] To achieve this objective, two recommendations are proposed: first, the convening of a three-judge court should be contingent upon a timely request by the defendant (a state officer) after receipt of a complaint within the purview of section 2281.[105] Second, the United States Supreme Court must construe the three-judge statute liberally in accordance with its contemporary utility in federal jurisdiction.[106]

VIII. Conclusion

The three-judge statute is in need of reexamination. Congress should first evaluate the contemporary utility of the provision. Finding sufficient merit in the provision, Congress should redraft the procedure so as to effectuate its underlying objectives.[107] Congress should also direct its attention to the obligatory direct review requirement which is believed responsible for the Supreme Court's ex-

[101] See text accompanying notes 22-31, *supra*.

[102] Hart & Wechsler, The Federal Courts and the Federal System 845 (1953); Bowen, *When Are Three Federal Judges Required?*, 16 Minn. L. Rev. 1, 6-8 (1931).

[103] See, *e.g.*, *Ex parte* Hobbs, 280 U.S. 168 (1929), where plaintiffs avoided the three-judge requirement by not raising a constitutional challenge to the state statute. The injunction was granted not upon the ground of the unconstitutionality of the statute but for reasons of statutory construction. Mr. Justice Holmes said, 280 U.S. at 172:

> The judge was clearly right in treating the plaintiffs ... as masters to decide what they would ask and in denying to the defendants ... the power to force upon the plaintiffs a constitutional issue which they did not care to raise.

[104] This assumes that the states still need and desire the protection afforded by the three-judge court. Thus, the states would seek three judges only when they felt their interests so demanded. By enabling the party protected by the procedure to determine its applicability, the three-judge statute would be comparable to the federal removal provisions.

[105] *Accord*, Currie, *supra* note 62, at 77-79.

[106] See text accompanying notes 81-87 *supra*. Even if the three-judge statute were amended, its effectiveness would depend upon the cooperation of the Supreme Court. In short, the Court's policy of restrictive construction would still operate to deprive the states of the protection presumably intended by Congress.

[107] The supremacy clause exception of *Swift & Co. v. Wickham* is inconsistent with the underlying policy of § 2281 and should be expressly abolished. *Accord*, Note, 11 Vand. L. Rev. 569 (1966).

press distaste for section 2281. At the same time, the Supreme Court should reconsider its traditional restrictive position. If Congress eliminates the burdensome direct review requirement, perhaps the Court will more readily reconsider its position.[108]

[108] As a practical matter, this writer concedes that Congress is unlikely to respond to this plea or the more eloquent pleas of others. Consider the following excerpt from FRANKFURTER & LANDIS, THE BUSINESS OF THE SUPREME COURT 42 (1928): "Legislation affecting the judicial structure, unless it calls for wholesale appointments, is without the driving force of a powerful, concentrated economic, political, or social interest."

Nonetheless, there may be some hope: "Congressional preoccupation with judicial organization is extremely tenuous all through our history except after needs have gone unremedied for so long a time as to gather compelling momentum for action, or when some unusually dramatic litigation arouses widespread general interest." *Id.* at 36-37.